COA NO. 34741-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JOHN CANNATA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable James M. Triplet, Judge

REPLY BRIEF OF APPELLANT (AMENDED)

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A. ARGUMENT IN REPLY

1. CANNATA WAS LEFT WITHOUT THE ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDINGS WHEN HIS COUNSEL AT THE PLEA WITHDRAWAL HEARING BECAME A WITNESS AGAINST HIM.

The State claims Cannata's counsel did not labor under an actual conflict of interest. Brief of Respondent (BOR) at 5-7. The law says otherwise: "'[A]n attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action.'" United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001) (quoting United States v. Levy, 25 F.3d 146, 155 (2d Cir. 1994)). "When an attorney testifies against his client during the course of representation, he has an actual conflict of interest." State v. Fualaau, 155 Wn. App. 347, 364, 228 P.3d 771 (2010) (citing State v. Regan, 143 Wn. App. 419, 430, 177 P.3d 783, review denied, 165 Wn.2d 1012, 198 P.3d 512 (2008)). Thus, in State v. Harell, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996), counsel's "direct conflict of interest" at the plea withdrawal hearing was "evidenced by his direct testimony against Harell's interest at the hearing."

Cannata's interest at the hearing was in withdrawing his plea. His attorney's testimony contradicted Cannata's claim on the contested matter

of whether he was accurately advised of the sentence he faced in pleading guilty. "An attorney must withdraw when it is likely he or she will present testimony related to *substantive contested matters.*" Regan, 143 Wn. App. at 431 (quoting State v. Nation, 110 Wn. App. 651, 659, 41 P.3d 1204 (2002)). Yet Cannata's attorney did not withdraw. Instead, he testified against his client. That is an actual conflict of interest, not a mere theoretical division of loyalty. "In testifying against his client, counsel acted as both counselor and witness for the prosecution. These roles are inherently inconsistent." United States v. Ellison, 798 F.2d 1102, 1107 (7th Cir. 1986), cert. denied, 479 U.S. 1038, 107 S. Ct. 893, 93 L. Ed. 2d 845 (1987).

The State seeks to distinguish Harell on the ground that the defendant's attorney in that case did not assist his client at the plea hearing, whereas Cannata's attorney aided Cannata at the hearing. BOR at 7 n.1. Cannata's attorney testified against him. 2RP 31-34. What kind of aid is that? With an attorney like that, who needs a prosecutor? The circumstances here differ somewhat, but not essentially, from those in Harell. Counsel informed the court of Cannata's assertions, abstained from examining Cannata about those issues even though Cannata was cross-examined by the prosecutor, represented as an officer of the court that he had gone over the plea deal and informed Cannata of the sentence

he faced, and then lamely told the court that he supported his client's motion to withdraw the plea. In contradicting Cannata's testimony, defense counsel did not assist Cannata in presenting his motion to withdraw his pleas to the trial court and in explaining to the court his confusion about the sentence to which he thought he was agreeing when he pled guilty. On the contrary, in making his statements to the court, defense counsel essentially functioned as a State's witness against Cannata. Counsel's statements defeated his client's motion.

When counsel testified as to matters against his client's interests, Cannata was deprived of his right to counsel. Harell confirms the point: "Harell was clearly without counsel while appointed counsel testified as a witness against him." Harell, 80 Wn. App. at 805. Harell cited Government of Virgin Islands v. Zepp, 748 F.2d 125, 138 (3d Cir. 1984) and Browning v. Commonwealth, 19 Va. App. 295, 452 S.E.2d 360, 362-63 (Va. Ct. App. 1994) in support. Harell, 80 Wn. App. at 805 n.4. Both cases recognize deprivation of counsel occurs when an attorney testifies against the client. See Browning, 19 Va. App. at 298-99 ("when appellant's counsel took the stand to testify as to matters against his client's interests, appellant was deprived of his right to counsel"); Zepp, 748 F.2d at 138 ("the admission of such testimony is so egregious that it constitutes a total abandonment of the loyalty which counsel owes his

client'). The deprivation of counsel requires automatic reversal. Harell, 80 Wn. App. at 805.

The State nonetheless argues that if there is no objection in the trial court, the defendant must show the actual conflict adversely affected the lawyer's performance. BOR at 5. Harell did not apply this standard. But even if this is the standard to be applied, Cannata satisfies it. It is inconceivable that defense counsel's testimony against Cannata did not have an "adverse effect" on him. An adverse effect is shown when the conflict causes a lapse in representation contrary to the defendant's interests or is likely to have affected particular aspects of counsel's advocacy on behalf of the client. Regan, 143 Wn. App. at 428. Counsel's testimony against Cannata was contrary to Cannata's interests in seeking to withdraw the plea. Further, and in the alternative, it is likely counsel's advocacy on the plea withdrawal motion was affected because, having told the court that he accurately advised Cannata of the sentencing consequences, he could not and did not turn around and zealously argue just the opposite as the basis for withdrawing the plea. Having established the adverse effect of an actual conflict of interest, a harmless error analysis is not required and prejudice need not be shown. Id. at 426-28.

2. THE COURT'S IMPROPER CONSIDERATION OF EVIDENCE OUTSIDE THE RECORD VIOLATED DUE PROCESS, ER 605 AND THE APPEARANCE OF FAIRNESS REQUIREMENT.

Cannata stands by the argument made in the opening brief. The State argues that if the judge relied on his personal knowledge of Cannata's attorney, that reliance was harmless. BOR at 9. An appearance of fairness violation is not subject to harmless error analysis. If the judge violated the appearance of fairness doctrine, then the remedy is reversal. Chicago, M., St. P. & P. R. Co. v. Wash. State Human Rights Comm'n, 87 Wn.2d 802, 811, 557 P.2d 307 (1976) ("we cannot say that a reasonably prudent and disinterested observer would conclude that the Railroad obtained a fair, impartial, and neutral hearing in the proceedings before the hearing tribunal. Therefore, the decision of the tribunal is not valid and cannot be sustained."); State v. Romano, 34 Wn. App. 567, 569-70, 662 P.2d 406 (1983); State v. Madry, 8 Wn. App. 61, 62, 70-71, 504 P.2d 1156 (1972). This makes sense because establishing the error also establishes that the judge should have recused himself from the case rather that act as a decision-maker in it. See Madry, 8 Wn. App. at 70 ("A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.").

3. THE GUILTY PLEAS ARE INVALID BECAUSE CANNATA WAS MISINFORMED ABOUT A DIRECT CONSEQUENCE OF HIS PLEA.

a. Cannata was misinformed that he was subject to an exceptional DOSA sentence.

Cannata was advised he was subject to a DOSA sentence and an exceptional sentence. Both are direct consequences of the plea because they govern the length of the sentence. Cannata's guilty pleas are not knowing, voluntary and intelligent because he was misinformed that an exceptional sentence could be imposed as part of a DOSA sentence. The DOSA sentences he received as part of his plea are exceptional in two ways: they exceed half the midpoint of the standard range and they run consecutive to each other and other non-DOSA counts. Both forms of the exceptional sentence are unauthorized as a matter of law.

The State maintains DOSA sentences can be run consecutively without constituting an impermissible exceptional sentence, implying Cannata was therefore not misinformed about a DOSA exceptional sentence. In a footnote, the State discounts Cannata's reliance on State v. Goss, 56 Wn. App. 541, 784 P.2d 194 (1990) on the ground that SSOSA sentences are "substantially different in nature and type" from DOSA sentences, as the SSOSA is only available to a first-time sex offender with

no history of violence. BOR at 12 n.4. The State does not explain why this distinction makes a difference.

The State misses the point about Goss. Goss held consecutive SSOSA sentences were unauthorized by statute because the SSOSA is a sentencing alternative that calls for the sentence to run within the standard range. Goss, 56 Wn. App. at 544. The DOSA, like the SSOSA, is a sentencing alternative that calls for a sentence within the standard range, fixed as half the midpoint. State v. Murray, 128 Wn. App. 718, 725-26, 116 P.3d 1072 (2005). The State does not and cannot coherently explain why the legislature would authorize consecutive DOSA sentences when it has not authorized DOSA sentences that go beyond half the midpoint of the standard range. If consecutive sentences were authorized, a court could bypass legislative intent to limit the length of a DOSA sentence to half the midpoint simply by running it consecutive to another DOSA sentence, thereby accomplishing through the back door what cannot be accomplished through the front: a lengthier term of imprisonment.

Further, the State's position conflicts with how the DOSA program is supposed to work. RCW 9.94A.662(1) dictates a DOSA "shall include" a period of confinement "for one-half the midpoint of the standard sentence range or twelve months, whichever is greater." While serving the prison portion of the DOSA sentence, offenders "shall undergo a

comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender." RCW 9.94A.662(2). The DOSA sentence "shall" also include "[o]ne-half the midpoint of the standard sentence range as a term of community custody, which must include appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services." RCW 9.94A.662(1).

"[T]he purpose of DOSA is to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes it would be in the best interests of the individual and the community." State v. Grayson, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005). To achieve this goal, the legislature, through the plain language of the statute, intended those subject to DOSA sentences to receive uninterrupted drug treatment, first in the prison setting and then in the community after finishing their DOSA prison term.

Running a DOSA sentence consecutive to a non-DOSA sentence upends this legislative intent. Consecutive sentences result in an offender being forced to remain in prison to carry out the remainder of other sentences after finishing the DOSA portion of the prison term instead of being released for drug treatment in the community as intended by the legislature. In this circumstance, the offender receives drug treatment in

prison as part of the DOSA sentence, then serves a non-DOSA sentence with no drug treatment, then restarts treatment when finally released into the community. That sequence of events frustrates the treatment goals of the DOSA sentence by chopping up the treatment periods, which can be a period of years depending on the sentences involved.

The State points out Cannata wanted consecutive sentences and advocated for them. BOR at 12; RP 99, 110, 126-27. That undermines rather than helps the State's position. First, "a defendant cannot agree to a sentence in excess of the court's statutory authority. In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005). Second, Cannata's request for consecutive sentences simply confirms he was misinformed about a direct sentencing consequence of his plea. There is no such thing as an exceptional DOSA sentence under the law, and so a DOSA sentence cannot be run consecutively. Cannata mistakenly believed such a sentence could be imposed as part of the plea.

But even if the State were right about running DOSAs consecutively, the plea is still invalid because Cannata was misinformed that he could receive an exceptional DOSA sentence beyond half the midpoint of the standard range. The State recognizes the court can only impose a DOSA based on the midpoint of the standard range and cannot go above it. BOR at 11-12 (citing Murray, 128 Wn. App. 718; State v.

Mohamed, 187 Wn. App. 630, 350 P.3d 671 (2015)). The State acknowledges the court in Cannata's case did not impose a DOSA based on the midpoint of the standard range. BOR at 12 n.3. Each of the DOSA sentences was above half the midpoint of the standard range and therefore constituted an exceptional sentence. Murray, 128 Wn. App. at 725; CP 88-89, 104-05.

The State seeks to escape the inevitable conclusion that Cannata was misinformed of a direct consequence of his plea by saying, in a footnote, that "[t]his sentence was entered without objection by Mr. Cannata, and has not been challenged on appeal." BOR at 12 n.3.

This Court can ignore this claim because it is only contained in a footnote, is undeveloped, and unsupported by citation to authority. See State v. Johnson, 69 Wn. App. 189, 194 n. 4, 847 P.2d 960 (1993) (placing an argument in a footnote is, at best, ambiguous or equivocal as to whether the argument is part of the appeal, and the reviewing court may decline to address an argument presented in this fashion); Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290, review denied, 136 Wn.2d 1015, 966 P.2d 1278 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."); King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 717, 846, 846 P.2d 550 (1993)

(argument for which no authority is cited nor supported may not be considered on appeal).

Even so, the State's attempt to avoid plea withdrawal on this point fails. First, the lack of objection below is no bar to relief. The claim that a guilty plea is invalid based on misinformation of a direct sentencing consequence may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). State v. Mendoza, 157 Wn.2d 582, 589, 141 P.3d 49 (2006); State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001). More than that, "a defendant cannot agree to punishment in excess of that which the Legislature has established." State v. McDougall, 132 Wn. App. 609, 612, 132 P.3d 786 (2006) (quoting In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)). The legislature has not authorized an exceptional sentence for a DOSA that goes beyond half the midpoint of the standard range. Murray, 128 Wn. App. at 725-26.

The State's further assertion that Cannata has not "challenged" this sentence on appeal is inaccurate. BOR at 12 n.3. Cannata challenges his sentence in the context of arguing he must be permitted to withdraw his pleas because he was misinformed about a direct sentencing consequence. Cannata was informed he was subject to an exceptional sentence, he

received an exceptional DOSA sentence, but the law does not allow an exceptional DOSA sentence.

The State complains Cannata did not assign error to the DOSA sentence. BOR at 14. It does not explain why this matters. Its hyper-technical complaint is untenable. Cannata did not assign separate error to the sentence because the assignments of error to the invalidity of the pleas necessarily encompass the illegality of the sentence. See Brief of Appellant at 1-2. Further, the remedy Cannata seeks from this appeal is not reversal of the sentence, leaving his pleas intact. The remedy he seeks is the opportunity to withdraw his pleas. That is why the assignments of error are geared to the invalidity of the pleas.

RAP 10.3(g) states that the court will review an error if it is included in an assignment of error "or clearly disclosed in the associated issue pertaining thereto." The error pertaining to the sentence is clearly disclosed in the associated, and primary, issue of the invalidity of the pleas based on misinformation about the sentence. The error in sentencing is intertwined with the error involving the invalid pleas.

In State v. King, 162 Wn. App. 234, 235, 253 P.3d 120 (2011), the appellant challenged the validity of his guilty plea, contending the offender score was wrongly calculated. The appellant's brief assigned error to the trial court's denial of the motion to withdraw the plea, but did

not assign error to the offender score itself. See Brief of Appellant filed in King (available online at www.courts.wa.gov/content/Briefs/A03/289052%20Appellant.pdf). The related issue pertaining to the assignment of error asked whether King should be allowed to withdraw his guilty plea because he relied on the State's erroneous calculation of his offender score. Id. This Court analyzed the issue by first determining the offender score was miscalculated and then determining the plea was invalid because King was misinformed of a direct sentencing consequence. King, 162 Wn. App. at 240-41. This Court had no problem reaching the merits of the issue. There was no confusion. The nature of the argument was clear.

Cannata is in the same position. His opening brief follows the same assignment of error approach used by the appellant in King. Cannata's assignments of error address the invalidity of the plea and the trial court's denial of the motion to withdraw the plea. BOA at 1. The issue associated with these assignments of error is whether Cannata must "be allowed to withdraw his pleas because he was misinformed about (1) his eligibility for an exceptional sentence on his Drug Offender Sentencing Alternative (DOSA); (2) the standard range sentence for one of the counts; and (3) the correct length of the DOSA sentence on that count." BOA at 2.

Cannata complied with RAP 10.3(g). The nature of the issue is clearly disclosed at the outset of the brief.

Even assuming arguendo it would be technically proper to make a separate assignment of error to the sentence in the context of challenging the validity of the pleas, the lack of such assignment is immaterial. A technical violation of the rules of appellate procedure "should normally be overlooked and the case should be decided on the merits." State v. Olson, 126 Wn.2d 315, 318-19, 893 P.2d 629 (1995) (citing RAP 1.2(a)). "The technical failure to assign error on appeal does not waive an issue that is clearly argued in the briefs." SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 138 n.4, 331 P.3d 40 (2014). "In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue." Olson, 126 Wn.2d at 323; see also State v. Davis, 79 Wn. App. 355, 359-60, 901 P.2d 1094 (1995) (where issue naturally flows from other issues properly addressed on appeal, appellate court may review issue not in assignment of error). Here, Cannata sufficiently argued and briefed the sentencing issues related to the invalidity of the pleas. The State is not prejudiced in any way due to the lack of a separate

assignment of error to the sentence itself. In fact, it does not claim prejudice. Cannata's arguments are properly before this Court.

The plea statements that included DOSA availability informed Cannata that he was subject to an exceptional sentence on all counts. CP 33-34, 42-43. Cannata entered a stipulation to aggravating factors that could be relied on to support an exceptional sentence on all counts, without distinguishing between DOSA and non-DOSA sentences. CP 65-66. His pleas involving the DOSA are not knowingly, voluntary and intelligent because he was misinformed about an exceptional sentence as a consequence of his plea.

b. Cannata was misinformed about the standard range for the attempted second degree assault count and the applicable DOSA sentence for that count.

Cannata was misinformed about the standard range on the attempted assault count. Section (a) of the plea statement lists the standard range for count 1, the attempted second degree assault offense, as 47.25 to 63 months. CP 40. The top of the standard range was actually 60 months. There is no dispute the length of a sentence, including the applicable standard range, is a direct consequence of a plea. Mendoza, 157 Wn.2d at 590, 594.

The State, however, argues Cannata was not misadvised about the standard range because he was "contemporaneously informed in both the

paperwork and the judge's advisements of [the] statutory maximum, and could not have believed that the sentence over 60 months was possible." BOR at 12-13. How would Cannata know that without being advised of it? Cannata is not an attorney versed in the intricacies of criminal law. No one told him that RCW 9.94A.599 requires that "the standard range must be reduced where the sentencing grid takes that range above the statutory maximum." State v. Brooks, 107 Wn. App. 925, 933, 29 P.3d 45 (2001).

The plea statement informs Cannata in plain terms that he was subject to a standard range of 63 months. CP 40. The plea statement did not inform Cannata that the standard range was actually 60 months because no sentence may exceed the statutory maximum. During the plea colloquy, the court reinforced the misinformation: "do you understand for attempted second degree assault the standard range of confinement is 43 and a quarter months to 63 months?" 1RP 6. Cannata answered "Yeah, I do." 1RP 6. Cannata was misinformed about the standard range, which is a direct consequence of his plea. Mendoza, 157 Wn.2d at 590, 594. "Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). There is no affirmative showing that Cannata was informed that the top of the standard range was 60 months.

The statutory maximum sentence and the applicable standard range sentence are both direct consequences of a guilty plea that must be disclosed to a defendant. State v. Kennar, 135 Wn. App. 68, 75, 143 P.3d 326 (2006). They are not "one and the same." Id. at 74. "[T]he top end of the standard range and the statutory maximum sentence determined by the legislature [are] different sentencing consequences." Id. (citing State v. Gore, 143 Wn.2d 288, 314, 21 P.3d 262 (2001), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)). "CrR 4.2 requires the trial court to inform a defendant of both the applicable standard sentence range and the maximum sentence for the charged offense as determined by the legislature." Id. at 75. Cannata was correctly informed of the statutory maximum. He was not correctly informed of the standard range. For the plea to be valid, Cannata needed to be correctly informed of both sentencing consequences, not just one of them. Id.

The plea is invalid for another, independent reason. Cannata was misinformed about the length of the DOSA sentence for the attempted second degree assault count. The DOSA sentence for the attempted second degree assault count was 26.8125 months in confinement and 26.8125 months on community custody, not the 27.5625 months derived from the plea statement.

The State does not dispute Cannata was misadvised about the length of the available DOSA sentence on the attempted assault count, but essentially contends the misinformation did not matter. It argues Cannata was correctly informed of the standard range for the DOSA on the attendant theft count and "[s]ince the DOSA's were requested as concurrent sentences on all charges, this obviated further inquiry into the specific DOSA lengths." BOR at 13. The State's argument fails because a plea is invalid even where misinformation about a direct sentencing consequence has no practical effect on the sentence, such as when sentences run concurrent. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 939-41, 205 P.3d 123 (2009); Walsh, 143 Wn.2d at 9-10.

The State claims "the minor" misinformation regarding the DOSA standard range on the attempted assault count was "clearly harmless" because it was "clearly irrelevant to any decision on the plea agreement." BOR at 13-14. This Court's decision in King destroys the State's position. In King, misinformation about the standard range on one of two counts permitted withdrawal of a guilty plea. King, 162 Wn. App. at 240-41. The Court observed "this error does not appear to have harmed Mr. King nor could it reasonably have influenced the decision to plead guilty" because the two counts were concurrent and "[a] lesser concurrent term would not prejudice Mr. King in any way." Id. at 241-42. This Court still

reversed and remanded to allow King to withdraw his plea because the Supreme Court "has eschewed harmless error analysis in this circumstance for the clarity of a bright line rule." Id. at 242 (citing Bradley, 165 Wn.2d at 937-38; Mendoza, 157 Wn.2d at 590).

In light of King and Supreme Court precedent, a harmless error analysis has no role to play in whether a guilty plea can be withdrawn. Contrary to the State's argument, Cannata need not show the misinformation about a direct sentencing consequence actually factored into his decision to plead guilty. Mendoza, 157 Wn.2d at 589-90; State v. Weyrich, 163 Wn.2d 556, 557, 182 P.3d 965 (2008). The bright line rule is that a defendant must be allowed to withdraw his or her plea when misinformed of a direct sentencing consequence. There is no appellate inquiry into a defendant's subjective decision to plead guilty because "[a] reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." Mendoza, 157 Wn.2d at 590 (quoting In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)).

B. CONCLUSION

For the reasons set forth above and in the opening brief, Cannata requests remand to allow him to withdraw his guilty pleas. In the event

this Court declines to afford this remedy, Cannata alternatively requests remand for a new plea withdrawal hearing at which he is represented by conflict-free counsel before a new judge.

DATED this 11th day of August 2017

Respectfully Submitted,

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